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No. 89-2031

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In the Supreme Court of the United States

OCTOBER TERM, 1990

KUANG HSUNG J. CHUANG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner has a legitimate expectation of privacy, under the Fourth Amendment, in bank documents that are routinely subject to periodic government inspection.

2. Whether 12 U.S.C. 481, which authorizes the Office of the Comptroller to inspect the records of nationally chartered banks, is constitutional.

3. Whether the Federal Deposit Insurance Corporation, acting as receiver, could inspect bank records maintained in an office that is used to conduct both bank business and a law practice.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 897 F.2d 646. The opinion of the district court denying petitioner's motion to suppress evidence (Pet. App. 17a-27a) is reported at 696 F. Supp. 910.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15a-16a) was entered on February 28, 1990. A petition for rehearing was denied on March 29, 1990. Pet. App. 14a. The petition for a writ of certiorari was filed on June 27, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to defraud the United States, to misapply bank funds, and to make false statements to bank regulatory agencies, in violation of 18 U.S.C. 371 (Count 1); making false statements to and concealing bank deposits from bank regulatory officials and agencies, in violation of 18 U.S.C. 1001 (Counts 2-14); misapplying bank funds, in violation of 18 U.S.C. 656 (Counts 15-20); conspiring to conceal illegal campaign contributions made with bank funds, in violation of 18 U.S.C. 371 (Count 21); and engaging in wire fraud, in violation of 18 U.S.C. 1343 (Count 22). The district court sentenced petitioner to five years' imprisonment on each count, to be served concurrently, and ordered him to pay $200,000 in restitution. Pet. App. 4a-5a.

1. Petitioner was the chairman, president, and chief executive officer of the Golden Pacific National Bank (GPNB). On June 17, 1985, during regular business hours, three bank examiners from the Office of the Comptroller of the Currency (OCC), entered GPNB's six-floor Manhattan office building and went to petitioner's third-floor office. The examiners produced an administrative subpoena and asked petitioner to provide documents relating to GPNB's sale of financial instruments known as "non-negotiable certificates." The examiners acted pursuant to 12 U.S.C. 481 and 12 C.F.R. 4.11 (1989), which require the OCC to examine the records of national banks and authorize the OCC to proceed without a warrant. Petitioner instructed Theresa Shieh, a vice-president and cashier at GPNB, to produce the requested documents. Virtually all the documents came from Shieh's fourth-floor office, and no documents came from petitioner's office. All the docu-

ments were bank documents, and none were petitioner's personal documents. Pet. App. 2a-3a.

As a result of the OCC's examination of GPNB's records, the OCC concluded that GPNB's sale of the nonnegotiable certificates was fraudulent and that petitioner had misrepresented to regulatory officials facts concerning the certificates and the use of bank funds derived from their sale. The OCC determined that GPNB was insolvent and, on June 21, 1985, appointed the Federal Deposit Insurance Corporation (FDIC) as its receiver. The FDIC secured the bank building that evening. The next day, it began to examine all relevant bank documents to calculate GPNB's assets and liabilities. As part of its examination of GPNB, the FDIC reviewed bank documents in the third-floor offices occupied by petitioner and his secretary. Pet. App. 3a.

2. Petitioner moved to suppress evidence derived from the OCC's and the FDIC's inspections of GPNB's bank records. Petitioner argued that the statute that authorizes the OCC to examine bank records, 12 U.S.C. 481, is unconstitutional on its face. Pet. App. 29a. He further contended, as a "fallback position," that the statute does not authorize an examination "akin to a physical search." *Id.* at 30a. The district court rejected these arguments, concluding that petitioner had no privacy interest in the bank documents and therefore lacked standing to challenge the OCC's actions. *Id.* at 34a-36a.

Petitioner sought suppression of the evidence that the FDIC obtained from his office on the ground that he used the office for his law practice as well as his bank activities and that a search of premises with intermingled uses required a warrant. Pet. App. 17a-18a, 20a, 22a. The district court rejected that argument, *id.* at 17a-27a, explaining that petitioner's office was functionally a part of the bank

and that "the FDIC as a receiver standing in the shoes of the Bank had authority to look through all of the Bank's premises and papers without a warrant." *Id.* at 21a-22a.

3. The court of appeals affirmed the denial of petitioner's suppression motions. Pet. App. 1a-13a. The court held that petitioner "cannot successfully challenge the legality of OCC's examination of GPNB because he has not demonstrated a sufficient privacy interest in bank documents, not found in his office, that he knew were routinely subject to OCC examination." *Id.* at 9a-10a. The court further concluded that "[s]ince the area searched by the FDIC as receiver clearly functioned as a mixed-use bank and law office for [petitioner], and since the FDIC as receiver may properly search GPNB without a warrant, we agree with the district court that the FDIC search was reasonable." *Id.* at 11a.

ARGUMENT

1. Petitioner argues that he has standing to challenge the OCC's examination of GPNB's bank records (Pet. 12-17), asserting that the court of appeals has "created new and erroneous Fourth Amendment law" (*id.* at 12). The court of appeals, however, has simply applied this Court's Fourth Amendment decisions to the particular facts of this case.

This Court stated in *Rakas* v. *Illinois*, 439 U.S. 128 (1978), that a defendant's right to contest the legality of a search and seizure turns on "whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." 439 U.S. at 140. Specifically, the defendant must have "manifested a subjective expectation of privacy" in the area or object of the search "that society accepts as objectively reasonable." *California* v. *Greenwood*, 486 U.S. 35, 39 (1988). See Pet. App. 5a-6a.

The court of appeals correctly determined that petitioner had neither a subjective nor an objectively reasonable expectation of privacy in the bank records at issue. As the court explained, "all of the documents examined were bank documents subject to periodic examinations by the OCC, which has a statutory duty under [12 U.S.C.] § 481 to examine the affairs of every national bank at least twice a year. 12 C.F.R. § 4.11 (1989)." Pet. App. 7a-8a. Petitioner, "as an officer of the bank, knew that bank documents, whether kept in his office or another office, were subject to periodic examination by the OCC." *Id.* at 8a. Petitioner, who took no steps to identify the documents as personal records, did not demonstrate "even a subjective desire to keep the bank documents private." *Ibid.* Moreover, even if petitioner had demonstrated a subjective expectation of privacy, society would not accept that expectation as objectively reasonable. For more than a century, federal bank regulatory agencies have conducted warrantless inspections of bank records, such as those involved here, to evaluate the fiscal soundness and integrity of financial institutions. See Act of June 3, 1864, ch. 106, § 54, 13 Stat. 116.[1]

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[1] Petitioner contends that "the most pernicious and important error of the Court of Appeals was its reliance on the statute making bank records subject to inspection." Pet. 14. He mistakenly characterizes the court's reliance as "circular." *Ibid.* The court looked to the statute as one factor in determining whether petitioner had a "legitimate expectation of privacy" in the bank's documents. Pet. App. 6a. The court properly recognized that a person cannot reasonably claim a "privacy interest in bank documents, not found in his office, that he knew were routinely subject to OCC examination." *Id.* at 9a-10a. In other words, the existence of the statute undermines petitioner's claim of a subjective expectation of privacy because petitioner, as a bank official, knew that the records would be periodically inspected. In addition, the existence of the statute undermines the objective reasonableness of petitioner's claim because the statute reflects a social consensus

Petitioner takes issue (Pet. 15-16) with the court of appeals' determination that he lacked a sufficient interest in the privacy of the office in which the records were stored to permit him to contest OCC's inspection. As an initial matter, we question the relevance of considering petitioner's privacy interest in the *place* where the documents were stored, as opposed to the documents themselves, because in this case there was never any "search" of the premises by the OCC. Petitioner, acting as an officer of GPNB, provided the documents at issue upon the OCC's request to inspect them. See Pet. App. 2a-3a.

Even if petitioner's privacy interest in the place where the documents were stored is relevant, his argument is without merit. As the court of appeals recognized (Pet. App. 6a-7a), in certain circumstances a corporate officer or employee may assert a reasonable expectation of privacy in his corporate office and may have standing with respect to a search of that office. See *O'Connor* v. *Ortega*, 480 U.S. 709, 714-719 (1987) (plurality opinion). That expectation rests on the fact that an individual may exercise dominion over his own office and the personal effects within that office that is distinct from the business's proprietary interest in the premises. *Id.* at 716-717. In this case, however, none of the documents came from petitioner's personal office or from any place that might be considered an extension of that office.[2]

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that bank regulators are entitled to warrantless access to bank records. That is not to say, however, that the statute *ipso facto* answers the Fourth Amendment reasonableness inquiry; the right to privacy in one's home would not be destroyed if Congress tomorrow enacted a statute permitting law enforcement officers to search homes without probable cause or a warrant.

[2] Petitioner erroneously claims (Pet. 12-14, 16) that there is a conflict between this case and *United States* v. *Leary*, 846 F.2d 592 (10th Cir. 1988); *United States* v. *Brien*, 617 F.2d 299 (1st Cir.), cert. denied, 446 U.S. 919 (1980); and *United States* v. *Lefkowitz*, 618 F.2d

Petitioner also claims (Pet. 16 n.14) that his proprietary and managerial interest in the bank entitled him to challenge the search of corporate premises. Petitioner confuses his responsibilities as a shareholder and corporate officer with his personal privacy interests. As GPNB's president, petitioner might have had authority at one time to challenge, on behalf of the bank, the OCC's inspection of bank documents located anywhere in the building. See *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 353 (1977). However, petitioner, acting as the president of the bank, elected not to object to the OCC inspection when it occurred, and the bank is not a defendant in this criminal action. Petitioner now challenges the OCC inspection in his personal capacity, and he therefore must rely upon his personal privacy interests.

2. Petitioner contends (Pet. 17-21) that the bank inspection statute, 12 U.S.C. 481, violates the Fourth Amendment. The district court rejected that challenge. Pet. App. 36a. The court of appeals concluded that be-

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1313, 1316 n.2 (9th Cir. 1980), aff'g 464 F. Supp. 227, 230-231 (C.D. Cal. 1979), cert. denied, 449 U.S. 824 (1980). Those cases, however, involve distinctly different facts. In each of those cases, the defendant challenged the legality of a search warrant authorizing a search of the entire business premises, including the defendant's offices, for relevant documents. In this case, by contrast, the OCC neither conducted nor threatened to conduct a search of petitioner's office.

Petitioner also erroneously claims (Pet. 15-16) that the court of appeals' decision is inconsistent with this Court's decision in *Minnesota* v. *Olson*, 110 S. Ct. 1684 (1990). In *Olson*, the Court rejected the argument that an overnight guest lacks a reasonable expectation of privacy in his host's home. Unlike *Olson*, this case does not present a situation where two persons have overlapping expectations of privacy in the same premises. The court of appeals did not reject petitioner's challenge merely because some other person had an expectation of privacy in the office in which the records were stored, but rather because petitioner could not demonstrate that he himself had an expectation of privacy in the contents of that office.

cause petitioner lacked a legitimate expectation of privacy in the bank documents that OCC examined, there was no need to address the issue. Pet. App. 5a. Thus, the issue is not properly before this Court. In any event, the statute, which was first enacted more than a century ago, does not raise constitutional concerns. As this Court has explained, the Fourth Amendment protects "an expectation of privacy that society is prepared to consider reasonable," *United States* v. *Jacobsen*, 446 U.S. 109, 113 (1984), and "[t]his expectation is particularly attenuated in commercial property employed in closely regulated industries," *New York* v. *Burger*, 482 U.S. 691, 700 (1987). "Banking is one of the longest regulated and most closely supervised of public callings." *Fahey* v. *Mallonee*, 332 U.S. 245, 250 (1942). Society has long accepted the need for federal regulators to perform bank inspections. Cf. *Langley* v. *FDIC*, 484 U.S. 86, 91 (1987); *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 456-458 (1947). As the district court found (Pet. App. 34a), there is no basis for distinguishing the kind of "search" conducted in this case from the routine semi-annual inspections that OCC performs for every national bank.

3. Petitioner also challenges (Pet. 22-24) the FDIC's search of his office and the examination of bank records found there. As the court of appeals held, when the FDIC acts as a duly appointed receiver of the bank, it stands in the shoes of the bank for purposes of examining the bank's records and conducting the bank's business. Pet. App. 10a-11a. The FDIC agents had the same right to be present in petitioner's office and to examine bank records there as petitioner himself had as president of the bank. In this context, Fourth Amendment considerations are not even implicated.[3]

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[3] Petitioner incorrectly claims (Pet. 22) that the court's decision in this case conflicts with *United States* v. *Cerri*, 753 F.2d 61 (7th Cir.),

There accordingly is no merit to petitioner's argument that the FDIC could not enter petitioner's office unless the agency had " 'probable cause' to believe that petitioner was conducting bank business from the law firm." Pet. 23. In any event, the court of appeals held that the FDIC had sufficient cause. Pet. App. 11a. Petitioner's third-floor office, which is the place where the OCC examiners met with petitioner in his capacity as president of the bank, was petitioner's only office in the building. *Ibid.* In addition, the office shared telephone lines with the bank, was connected by an interior stairway, and was not separately identified from the bank on the building's directory. *Ibid.* The fact that petitioner also used the office for his law practice cannot disable the FDIC as receiver from exercising the full powers that petitioner himself had, as bank president, to be in the office and to examine bank records.[4]

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cert. denied, 472 U.S. 1017 (1985). In *Cerri*, an agent of the Bureau of Alcohol, Tobacco and Firearms (BATF) entered the defendant's home to search for and inspect firearms business records. The agent acted under the authority of a statute requiring defendant to maintain the records and to submit to their inspection at his place of business. The court concluded that the search was lawful because the agent had, at a minimum, probable cause to believe that the defendant's home was his place of business. Petitioner concedes that "the Court of Appeals in this case did not explicitly reject the probable cause requirement." Pet. 22. Indeed, the court of appeals cited *Cerri* without criticism. Pet. App. 11a. In any event, the probable cause inquiry in *Cerri* is inapposite here. The FDIC, as receiver, had essentially the same authority to enter the bank premises as petitioner himself possessed. The BATF agent in *Cerri*, by contrast, did not have comparable authority.

[4] As the court of appeals observed (Pet. App. 11a-12a), neither petitioner nor any third parties sought to suppress documents on the ground that the documents were privileged.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney

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